IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
SECOND APPEAL NO.415 OF 1991

Shri Damodar Jivan Mhatre,
Age 50 yrs., Occ:Agri.,
R/o.Kelva, Taluka Palghar,
Dist.Thane. Appellant
(Org.Deft.No.1)

Vs.

1. Smt.Bebibai Baburao Mhatre,
age 46 yrs., Occ:Agri.

2. Shri Hareshwar Baburao Mhatre,
age 35 yrs., Occ:Service & Agri.

3. Shri Balkrishna Baburao Mhatre,
age 35 yrs., Occ:Agri & Service

4. Kum. Kalpana Baburao Mhatre,
age 22 yrs.

5. Shri Nathuram Jivan Mhatre,
age 45 yrs., Occ:Agri.

All residents of Kelva, Tal.Palghar,
Dist.Thane. Respondents
(1 to 4 Org.Plffs.
& 5-Org.Deft.No.2)

Mr.Arvind J. Joshi for appellant.

Mr.S.G.Karandikar h/f. Mr.G.B.Karandikar for Resp. Nos.1 to 4.

Respondent No.5 served (absent).

CORAM: B.H.MARLAPALLE,J.

December 21, 2005.

ORAL JUDGMENT

1. This Second Appeal arises from the decree of

partition passed by the learned Civil Judge, Junior Division at Palghar on 3/1/1989 in Regular Civil Suit No.4 of 1986 and duly confirmed by the 4th Additional District Judge at Thane in Civil Appeal No.61 of 1989 which was dismissed vide judgment and order dated 23/1/1991. While admitting this appeal on 26/8/1991 this Court framed the substantial question of law for consideration in the following words:

> "There involves a substantial question relating to the procedural error in not framing the points for determination by the lower Appellate Court."

2. It is seen from the judgment and order of the lower Appellate Court that it had framed the following issue and answered in the negative:

> Is there any necessity to interfere with the judgment and decree passed by the lower Court?"

It is also pertinent to note that in the memo of this second appeal the appellant has not framed any substantial question of law for the consideration of

this Court though the grounds of objection to the decision appealed against are set out. In the case of Girijanandini Devi v. Bijendra Narain Choudhary **[AIR 1967 SC 1124]** a three-Judge Bench observed in para 12 as under:

> "The Trial Court, as we have already observed, on a consideration of the entire evidence and the subsequent conduct of the parties came to the conclusion that there was no severance of Bijendra Narain from his uncle Bidya Narain and with that view the High Court agree. It is true that the High Court did not enter upon a reappraisal of the evidence, but it generally approved of the reasons adduced by the Trial Court in support of its conclusion. We are unable to hold that the learned Judges of the High Court did not, as is contended before us, consider the evidence. It is not the duty of the appellant Court when it agrees with the view of the Trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court. Expression of general agreement with reasons given by the Court

decision of which is under appeal would ordinarily suffice."

3. The present respondent nos.1 to 4 - plaintiffs instituted Regular Civil Suit No.4 of 1986 for partition of the joint suit property by impleading the present appellant-Damodar as defendant no.1 and the respondent no.2-Nathuram as defendant no.2. It was contended that Shri Jivan, son of Shinwar Mhatre had purchased the suit agricultural land on 23/7/1949 from Shri Padmanath Ganpat Raut for the consideration of Rs.499/- and mutation was effected pursuant to the sale transaction in favour of Jivan by Entry No.1522 dated 20/8/1949. Jivan had three sons viz. Baburao (the husband of plaintiff no.1 and father of plaintiff nos.2 to 4), Nathuram (defendant no.2) and Damodar (defendant no.1). Jivan died on 31/8/1954 when the defendant no.1 was a minor and on Jivan's demise the suit property was entered in the names of all his three sons as the joint owners by Mutation Entry No.2021 dated 16/3/1955 as per the application made by Baburao, the eldest son of Jivan and Baburao became the Karta of the family. However, Baburao died on 7/6/1983 and in his place the names of all the plaintiffs were entered into the record of rights

vide mutation entry no.7748 dated 11/7/1983. As per the plaintiffs on the demise of Baburao the defendant no.1 took possession of the suit land and refused to give the share from the produce of the said land. It was alleged that the defendant no.1 took the plea that the plaintiffs had no concern with the suit land and consequently the plaintiffs issued a legal notice on 1/12/1985 to the defendant no.1 with a copy to defendant no.2. The defendant no.1 replied the said notice through his Advocate on 9/12/1985 and contended that there was a partition of the entire joint family property during the life time of Baburao and the suit property had gone to the exclusive share of defendant no.1. The plaintiffs in addition to the claim of 1/3rd share in the suit property had also prayed for mesne profits at Rs.2000/- which claim came to be turned down by both the Courts below but the decree of partition confirming the 1/3rd share of the plaintiffs has been confirmed by the lower Appellate Court as noted hereinabove.

4. On behalf of the plaintiffs, plaintiff no.2 - Hareshwar was examined as PW 1 and he placed on record the documents like 7/12 extracts (Exhibits 17 to 19), change of mutation entries in the record of

rights (Exhibits 20 to 22), legal notice dated 1/12/1985 (Exhibit 23) and the reply received on behalf of the defendant no.1 at Exhibit 25. The defendant no.2 did not contest the suit but the defendant no.1 opposed the suit by filing his written statement at Exhibit 12 and in support of his exclusive right over the suit land he examined himself as DW 1. Exhibit 20 proved that the suit land totally admeasuring about 34 Rs. and located in Survey No.79/1, 79/6 and 79/15 was purchased by Jivan from Padmanath Raut and the mutation entry was effected in favour of Jivan on 20/8/1949. Exhibit 21 proved that on the demise of Jivan an application was made to enter the names of his three sons as the joint owners of the suit land and accordingly the mutation was carried out. Exhibit 22 indicated that on the demise of Baburao on 7/6/1983 the names of the plaintiffs were inserted in the record of rights in place of Baburao and along with defendant nos.1 and 2. The 7/12 extracts at Exhibits 17 to 19 also support the claim of the plaintiffs that they were the joint owners of the suit land along with the defendants. This oral and documentary evidence was considered by the trial Court and it held on assessment of the said evidence that the suit

property was a joint family property, the defendant no.1 failed to prove that it was allotted to his share in partition and the plaintiffs were entitled to get the partition and separate possession of 1/3rd share from the suit property. While the claim for the mesne profits of Rs.2000/- for the past period was rejected, the trial Court held that the plaintiffs are entitled to get the mesne profits for the future.

5. In his written statement at Exhibit 12 the defendant no.1 specifically took the plea of partition by which the suit land had come to his share and except his bald statement there was no other evidence by way of documents etc. It was necessary for him to prove that the partition had taken place by metes and bounds and the partitioned share and more particularly the suit land was put in his exclusive possession at any time during the life span of Baburao. The depositions of defendant no.1 before the trial Court do not meet these requirements. The learned counsel for the defendant no.1 relied upon the decision of this Court in the case of Bhalchandra Vishweshwar Deshmukh v. State of Maharashtra **(1983 Mah.L.J. 1014)** in support of the

challenge to the decree passed by the trial Court. However, the following observations of this Court in Bhalchandra's case show that the plea of exclusive rights over the suit land in the alleged partition could not be proved by the defendant no.1:

> "...At any rate, once the partition by metes and bounds was effected and the separate shares are placed in separate possession of the sharers, Hindu Law commands that the status of the Hindu Joint Family is ruptured and the sharers become the exclusive owners of their respective properties..."

In the case of Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax **[(1983) 2 SCC 155]** relied upon by the learned counsel for the defendant no.1 it has been held that the partial partition of the properties brought about by the father between himself and his minor sons is valid and binding. It was not the claim of the defendant no.1 that during the life time of his father the joint family property was partitioned and the suit land was put in his exclusive possession. The plaintiffs themselves had set out in the plaint that though there was a

partition of the joint family property before filing of the suit, the suit land being a marginal holding, was retained as a common property between the plaintiffs and the defendants. Whereas defendant no.2 was put in possession of the tenanted land and there was no agricultural land earmarked to the share of the plaintiffs as opposed to the share of the defendants. This claim of the plaintiffs was challenged by the defendant no.1 alone and solely on the ground that in the partition the suit land was given to his exclusive share. If that be so, it was not known as to why he did not take steps to change the revenue record so as to show him the exclusive owner of the suit land. The record all along indicated that the suit land was a common property of the plaintiffs and the defendants and as it measured only 34 Ares, the trial Court accepted the plea of the plaintiffs that it being a marginal holding, the brothers had agreed to retain it as a joint property. No evidence was placed on record by the defendant no.1 so as to disturb this finding and, therefore, the lower Appellate Court rightly confirmed the decree passed by the trial Court. This appeal does not raise any substantial question of law that requires consideration while examining the challenge

to the orders passed by both the Courts below and confirming the plaintiffs' right of 1/3rd share over the suit land. The lower Appellate Court has considered the oral and documentary evidence so as to find out if there was any occasion to interfere with the view taken by the trial Court for holding that the suit land was in fact a joint property of the plaintiffs and the defendants and not the exclusive property of the defendant no.1.

6. In the premises and for the reasons stated hereinabove this appeal fails and the same is hereby dismissed with costs.

(B.H.MARLAPALLE,J.)